Non-paper from the Netherlands on the consultation
'Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy'

The Netherlands welcomes the opportunity to share its views on digital platforms. Platforms are important drivers of innovation and economic growth. They create new markets and challenge the existing status quo, oftentimes leading to new and innovative solutions. Their disruptive nature often leads to conflicts with vested interests and challenges governments and regulators to re-assess their role and the efficacy of existing regulations in safeguarding public interests. This sometimes leads to genuine concerns about platforms and their business practices. At the same time it is important not to lose sight of all the benefits that platforms have brought and how they are also contributing to public interests, such as freedom of speech. Also, there are already a lot of regulations that platforms have to comply with, such as competition law and the unfair commercial practices directive, safeguarding public interests.

Towards a cohesive analysis framework for digital platforms

Successful internet companies often fulfil a platform function in the digital economy. They provide the infrastructure that facilitates the transactions and interactions between parties. Examples include Booking.com, which operates as an agency for hotels; Ebay, a site through which private individuals can offer second-hand items for sale; and the app stores of Apple and Google that facilitate contact between the app makers and their customers. However, Facebook and other social media also operate as platforms bringing users together. The role of the middleman and intermediary is nothing new, but the opportunities these platforms offer in terms of scalability and the number of potential customers that can be reached gives the role a new dimension.

The rise of digital platforms creates many new opportunities. Businesses can easily offer products to a potential buying public of millions via digital platforms such as Ebay or Alibaba, and consumers have access to a huge range of products. Digital platforms create new markets and they change the dynamics in existing markets. They also make prices and the quality of products and services more transparent, resulting in more competition. This leads to a greater and more diverse range of products, at more competitive prices and with better quality. For example, Booking.com offers an overview of hotel prices and customer reviews. Thus digital platforms are a source of innovation that brings about many changes in the economy and in society, and so the Dutch government supports this development wholeheartedly.

However, the advance of digital platforms is also accompanied by challenges. There are risks from so-called network effects - a platform becomes more attractive if more producers offer their product(s) and more consumers make active use of the platform - which can create barriers to switching to another provider. This can lead to positions of economic dominance which can exclude competitors and newcomers. The use of data can further raise switching barriers. If a consumer cannot transfer his data when he switches to another platform or in the case that other (new) platforms do not have access to the data of a dominant platform, it will be less attractive for consumers to switch or for other (new) platforms to enter the market. Large-scale use of data, including personal details, also has other risks, for example in the area of privacy. Finally, we see that digital platforms shake up existing - usually regulated - markets, which leads to a new set of questions. Airbnb is a good example of this. This platform has given a new impetus to the short-term letting of private homes but, at the same time, it raises new questions such as possible unfair competition with existing providers and the impact on public interests such as safety and quality of life.

Two sides to the story
That questions on digital platforms are often two-faced is illustrated by the use of ‘price parity clauses’. This type of clause might hinder competition by prohibiting a supplier to offer the product or service for a lower price on other platforms, which can make it less attractive for suppliers to supply their product on other platforms. Moreover, for consumers it can be less attractive to buy the product on another platform because as a result of the price parity clause that platform cannot offer a lower price. At the same time, a price parity clause can have positive effects as well. Without such a clause producers can reach many people via a platform, but finally sell their product in another way in order to avoid the commission the producer has to pay once he sells the product via the platform. As a result, the turnover of the platform decreases, which might lead to the platform exiting the market, with an associated loss of all the benefits it created for both consumers and society. As such ‘price parity clauses’ can be a prerequisite for investment. Such a clause might be essential to prevent other platforms free riding on the investments of a particular platform.

The emergence of digital platforms and the issues involved raise the question of whether the range of policy instruments currently at the government's disposal still suffice. In order to make a thorough analysis of this, the Dutch government has asked a consortium made up of TNO, Ecorys and the Institute for Information Law (IViR) to draw up a cohesive analysis framework for issues relating to digital platforms.

Summary of the analysis framework
Each digital platform is different and comes with its own issues. The starting point for the analysis framework is therefore to identify the different characteristics of the digital platforms, including the earnings model used, potential economies of scale, network effects and the integration of different services. To bring some kind of order to this, the analysis framework uses four types of platforms: reseller/distributor (e.g. Zalando), market place (e.g. Ebay), social network (e.g. Facebook), and platform to platform (e.g. Google).

The next step is to look at the impact these aspects have on public interests. The framework works with four public interests: competition and innovation, consumer interests, freedom from improper influence, and integrity and continuity.

Based on the characteristics identified and their impact on public interests, an analysis can then be performed to ascertain whether there is any reason for government intervention. If so, the framework identifies a number of options by which public interests can be safeguarded, for example: the introduction of new legislation and regulations, the removal of obstructive rules, or the stricter application of rules. The conclusion could also be that the present framework does not need to be changed but that it would be desirable to clarify the scope that exists for innovation.

This analysis framework should enable governments to make better use of the opportunities that platforms offer, to be better able to appreciate and mitigate the risks, and also to get an idea of the right instruments that can be used. The results of the research offer good points of reference for analysing platform issues in a systematic way and for a balanced discussion of the issues with the different stakeholders.

Conclusions for policy

Based on the report, the Dutch government draws the following conclusions for policy.

Generic digital platform regulation is not necessary; we should on the contrary have a tailored approach

Despite repeated calls for more general rules, the findings of the research do not suggest that additional generic rules should be drawn up for digital platforms, with respect to platform neutrality for example. The current instruments usually provide sufficient guidance. Although certain characteristics, such as network effects and large-scale use of data and personal details, are more of an issue with digital platforms than with traditional businesses, they are not unique to digital platforms. Furthermore, there are already plenty of instruments available which can tackle potential problems,

such as generic consumer protection instruments to safeguard consumers' interests and competition law to assess abuse of a position of economic dominance. For example, platforms are ‘traders’ as defined in the Unfair Commercial Practices directive. As such they should adhere to this directive. Therefore they should be transparent in providing information and not mislead consumers in their commercial communication. This directive offers sufficient obligations for ensuring transparency by platforms and provide regulators with the tools to effectively enforce where necessary. At the moment the Commission is reviewing its guidance for interpretation of the Unfair Commercial Practices directive. The Dutch government is pleased to see that the Commission has specific attention for platforms in relation to the interpretation of this directive. This illustrates how there are already existing instruments that are applicable to platforms and that can applied when there is a demonstrated need.

Deciding that no additional generic regulations are necessary does not mean that no rules are necessary. It means that we need a tailored approach. The characteristics and relevant public interests will have to be assessed on their own merits in each case, looking at whether additional or indeed fewer rules are needed. The public interests that come into play in the letting of private homes to tourists are different from those in the taxi market, for example. The administrative level at which public interests can best be safeguarded also differs from one case to another. Concerns about quality of life are probably best addressed at local level, while concerns about positions of economic dominance can best be acted upon at national or even European level.

Dynamic regulation
The context in which digital platforms operate is constantly changing. In dynamic sectors like this, the authorities should be cautious about intervening because of the major consequences this could have for innovation and dynamics. If the authorities do decide to intervene, the challenge is to apply the existing instruments in the right way. It is important when doing so to not only look at the present situation. For example, Hyves was once a dominant player in the Dutch market for social networks but was overshadowed by Facebook in the space of just a few years. These dynamics demand legislation that can keep pace with developments. Future-proof legislation and regulations through goal based regulation is one instrument that can be used for this. By making clear what purpose a law is intended to serve and what public interests it is intended to protect, and by working with objectives instead of provisions setting out the measures to be taken to achieve this objective, the government will indicate how to respond rapidly to future developments.

If the objective is clearly defined, it is possible to give national and other supervisory authorities more freedom to allow people to reach that objective in different ways. This makes it possible to have a more flexible and tailored approach. It is important in this context that national supervisory authorities in the different Member States cooperate more, for instance through the BEREC, the Body of European Regulators for Electronic Communications, or the Article 29 Working Party. Looking together at how goal based regulation can best be interpreted will bring about greater uniformity in the interpretation of the rules. This should prevent the possible spread of legal uncertainty.

Better regulation due to digital platforms
Finally, it is good to note that digital platforms also create opportunities to safeguard public interests better. This is because they usually lead to improved operation of markets, by making quality and prices more transparent for example, and reputation mechanisms work better. This strengthens the position of consumers. As a result, legislation and regulations could be designed differently in the future and they could be less burdensome. There is a direct role reserved for consumers in this. They can pass on information to digital platforms as a result of which public interests can be better protected. In the Netherlands, the Dutch platform Marktplaats (a website for classified ads) for example, works closely with users, supervisory authorities and government bodies to combat illegal practices on its platform.